IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ZACKARY KEGAN CRUZ, Plaintiff, v. CITY OF BROWNFIELD POLICE DEPARTMENT, OFFICERS JOSHUA CORONADO, AND MATTHEW VALDONADO, Defendants.	§ § § § § § § § § §	 CAUSE NO. 5:12-CV-00123-C ECF

DEFENDANTS' MOTION AND BRIEF TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE, SAM R. CUMMINGS:

COME NOW Defendants City of Brownfield Police Department, Officer Joshua Coronado, and Officer Matthew Valdonado, and file their Motion and Brief to Dismiss, and in support thereof would show the Court as follows:

I. BACKGROUND

The Plaintiff brings a federal excessive force claim, and perhaps a state claim for assault,[1] arising out of the arrest of the Plaintiff in August of 2011. The Complaint makes allegations relating to excessive force during the arrest of the Plaintiff, and does not make any allegations concerning alleged excessive force during any time that the Plaintiff was incarcerated.

[1] It is not entirely clear whether the Plaintiff is asserting a state law claim. Paragraph 2 of the Complaint references "supplemental jurisdiction over the Plaintiff's state law claims", but there is only one formal cause of action asserted, namely, excessive use of force pursuant to 42 U.S.C. § 1983. The only *possible* reference to a state cause of action is in ¶ 1 of the Complaint where the Plaintiff references an assault. However, an assault is an intentional tort which means that the law enforcement officers and the City of Brownfield are entitled to immunity for any state cause of action relating to assault pursuant to provisions of the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE. § 101.057 (providing that the Texas Tort Claims Act does not provide for a limited waiver of immunity for, *inter alia*, intentional torts); *see also Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011); TEX. CIV. PRAC. & REM. CODE. § 101.106 (addressing state immunity and irrevocable elections of the person or employer to sue); *see also* this Court's June 8, 2011 Order (Doc. 354 at 8-9) in *Ramirez/Sifuentes v. Abreo, et al.*; 5:09-CV-190-C, which, *inter alia*, recognized that intentional state tort claims were barred against individuals and their governmental employer under Texas' Tort Claims Act.

Additionally, the Plaintiff sues not only the officers alleged to have been involved in the incident, in their individual and official capacities, *see* Pl.'s Compl. at ¶ 4, but also sues the City of Brownfield Police Department.

For the reasons set forth below, the Defendants assert that the Plaintiff has failed to assert a claim upon which relief may be granted as to Defendant City of Brownfield Police Department, because it is not a jural entity, and for any Eighth Amendment claims because the Plaintiff was not incarcerated at the time of the alleged assault. The Plaintiff has not asserted a municipal liability claim, so the official capacity claims must be dismissed. Also, the Court lacks jurisdiction over state claims.

II. Rule 12(b)(6) Standard of Review

Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." *See* Fed. R. Civ. P. 12(b)(6). Under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' "it demands more than 'labels and conclusions.'" *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "'[A] formulaic recitation of the elements of a cause of action will not do.'" *Id.*

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breeches Litig.*, 495 F.3d 191, 205 (5th Cir.2007) (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir.2004)). To survive the motion, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "Conversely, 'when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir.2007) (quoting *Twombly*, 550 U.S. at 558).

III. Rule 12(b)(1) Standard of Review

To the extent that the Plaintiff invokes a state clause of action, this Court lacks jurisdiction. The same standard of review applies to motions to dismiss under Rule 12(b)(1) and motions urged pursuant to 12(b)(6) of the Federal Rules of Civil Procedure. *See Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 351 (5th Cir.2003). A court may find lack of subject matter jurisdiction based on (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir.2001); *Clark v. Tarrant County, Texas*, 798 F.2d 736, 741 (5th Cir.1986). The party asserting jurisdiction bears the burden of proof on a Rule 12(b)(1) motion to dismiss and must show that jurisdiction exists. *Ramming*, 281 F.3d at 161.

IV. Analysis

A. The Brownfield Police Department is Not a Jural Entity and Must Be Dismissed

Under Federal Rule of Civil Procedure 17(b), in order to be sued, a "part[y] must have the capacity to sue or be sued." *See Maxwell v. Henry*, 815 F.Supp. 213, 215 (S.D. Tex. 1993); *see also* Fed. R. Civ. P. 17(b) (capacity to sue or be sued). Whether the Brownfield Police Department has the capacity "to sue or be sued is 'determined by the law of the state in which the district court is held.'" *See Paredes v. City of Odessa*, 128 F.Supp.2d 1009, 1013 (W.D. Tex.

2000) (quoting *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313 (5th Cir. 1991) (citing FED. R. CIV. P. 17(b))).

"In Texas, county sheriff's and police departments generally are not legal entities capable of being sued, absent express action by the superior corporation (the county, in the case of the sheriff's department) 'to grant the servient agency with jural authority.'" *See Jacobs v. Port Neches Police Dep't*, 915 F.Supp. 842, 844 (E.D. Tex. 1996) (quoting *Darby*, 939 F.2d at 313). Thus, "[i]n order for a plaintiff to sue a city department, [that department] must enjoy a separate legal existence." *See Darby*, 939 F.2d at 313 (internal citations and quotations omitted).

Defendant City of Brownfield Police Department is not a jural entity that may sue or be sued. This Court, in another § 1983 case, dismissed the Brownfield Police Department because it was not a jural entity. *See Rolen v. City of Brownfield*; 5:03-CV-304-C (Document 13 at 7)(citing *Darby*, 939 F.2d at 313-14 and *Coffer v. Tarrant Co.*, 2003 WL 21999463, *2 (N.D. Tex. 2003)). Therefore, Defendant City of Brownfield is not a proper party to this lawsuit and must be dismissed.

B. OFFICIAL CAPACITY CLAIMS MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Although the Plaintiff sues the police officers in their individual and official capacities, the Plaintiff has not asserted a claim which would make the officers liable in their official capacities.

The Plaintiff has failed to identify a custom or policy of the City of Brownfield[2] which proximately caused the Plaintiff's alleged constitutional deprivation. The Plaintiff has simply asserted that the individual officers engaged in unconstitutional excessive force. By asserting

[2] "Official-capacity suits ...'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell v. New York City Dep't. of Soc. Servs.*, 436 U.S. 658, 690 n. 55 (1978)).

claims against the individual officers in their official capacities, and by failing to detail any alleged unconstitutional custom or policy of the employer, the Plaintiff simply seeks to impose *respondeat superior* liability upon the employer. The United States Supreme Court has "consistently refused to hold municipalities liable under a theory of *respondeat superior*." *See Board of County Com'rs of Bryan County OK v. Brown*, 520 U.S. 397, 403 (1997). The Plaintiff has therefore failed to assert a claim against the City of Brownfield upon which relief may be granted, pursuant to *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 689-92 (1978). *See Hinojosa v. Butler*, 547 F.3d 285, 296 (5th Cir. 2008).

The Supreme Court has recognized very narrow circumstances in which a municipality may be held liable for the conduct of its employees, even if such conduct is unconstitutional. *See Monell*, 436 U.S. at 694; *see also Snyder v. Trepagnier*, 142 F.3d 791, 795 (5th Cir. 1998). A municipality may only be liable under § 1983 if the execution of its policy or custom deprives a plaintiff of a constitutionally protected right. *See Brown*, 520 U.S. at 403. Thus,

> it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the [government entity]. The plaintiff must also demonstrate that, through its deliberate conduct, the [government entity] was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the [government entity's] action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the [government entity's] action and the deprivation of federal rights.

See id.

Therefore, beyond proof of a deprivation of rights, municipal liability under § 1983 requires proof of three elements: (1) an official policy or custom, of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose moving force is that policy or custom. *See Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002); *see also Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (stating the three elements as: (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose moving force is the policy or custom). The burden of proving an unconstitutional policy is on the plaintiff. *See St. Louis v. Praprotnik*, 485 U.S. 112, 128, 108 S. Ct. 915, 926 (1988).

In our case the Plaintiff has not even attempted to assert an unconstitutional policy of the City of Brownfield which was a moving force as to the Plaintiff's alleged constitutional deprivation. Consequently, the Plaintiff's official capacity claims are not viable because they fail to meet the pleading standards articulated in *Iqbal*[3] and *Twombly.*[4] Therefore, not only must Defendant City of Brownfield Police Department be dismissed from the lawsuit, but the Plaintiff's official capacity claim, which is the same as a claim against the City of Brownfield, must also be dismissed.

C. PLAINTIFF'S EIGHTH AMENDMENT CLAIMS MUST BE DISMISSED

Constitutional rights of a convicted state prisoner come from the Eighth Amendment's prohibition on cruel and unusual punishment, *see Hare v. City of Corinth, Miss.*, 74 F.3d 633, 639 (5th Cir. 1996), whereas the constitutional rights of a pretrial detainee come from the Fourteenth Amendment. *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)); *see also Farmer v. Brennan*, 511 U.S. 828, 832-33 (1994).

The United States Supreme Court has held that when a person claims "that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person...such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard[.]" *See Graham v. Connor*, 109 S.Ct. 1865, 1867-78 (1989). Because all of the claims in the Complaint relate to alleged events that occurred

[3] 129 S.Ct. at 1949.
[4] 550 U.S. at 555.

at the time of the arrest, pre-conviction, the Plaintiff cannot assert an Eighth Amendment claim. Therefore, the Plaintiff's claims brought pursuant to the Eighth Amendment must be dismissed.

D. To the Extent The Plaintiff Has Asserted a State Claim Relating to An Alleged Assault During the Arrest, it Is Barred by the Texas Tort Claims Act

As addressed in footnote 1, *supra*, the Plaintiff makes a vague allegation concerning invoking supplemental jurisdiction over state law claims, but does not formally assert a state law claim. The Complaint in paragraph 2 also vaguely references that the Plaintiff seeks damages "for related common law and statutory claims under the laws of the State of Texas." However, any state law claims are barred because they all arise out of an alleged intentional tort which is barred by Texas' sovereign immunity and provisions of the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE. § 101.057 (providing that the Texas Tort Claims Act does not provide for a limited waiver of immunity for, *inter alia*, intentional torts). Consequently, this Court lacks jurisdiction over state claims pursuant to Rule 12(b)(1). *See* FED. R. CIV. P. 12(b)(1).

The doctrine of sovereign immunity has existed since Texas was its own sovereign nation, and emanates from the English law that "the king can do no wrong." *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 234-235 (1765); *Alden v. Maine*, 119 S.Ct. 2240, 2248 (1999). There is a presumption that a governmental unit, (as well as its employees) are immune from both suit and liability unless the Texas Tort Claims Act waives immunity. *See Renteria v. Housing Authority of the City of El Paso*, 96 S.W.3d 454, 457-58 (Tex. App.—El Paso 2002, pet. denied). The Texas Tort Claims Act waives sovereign immunity in three areas: "use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property." *See Lowe v. Texas Tech University*, 540 S.W.2d 297, 298 (Tex. 1976); TEX. CIV. PRAC. & REM. CODE § 101.021. In fact, § 101.057(2) of the Texas Civil Practice and Remedies Code provides that the limited waiver of immunity under the Texas Tort

Claims Act does not apply to a claim "arising out of assault, battery, false imprisonment, or any other intentional tort." *See* TEX. CIV. PRAC. & REM. CODE § 101.057(2). Furthermore, any attempt to "plead around" the intentional tort exception by trying to couch a claim as one sounding in "negligence", has been soundly rejected by Texas courts.

Cases wherein a negligence claim has been rejected under the Texas Tort Claims Act because it arose out of an intentional tort are as follows:

- *City of Waco v. Williams*, 209 S.W.3d 216-223-24 (Tex. App.—Waco 2006, pet. denied) (listing cases wherein attempt to plead negligence resulted in dismissal under Texas Tort Claims Act because incident arose out of an intentional act);

- *Texas Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001) (plaintiff's claim that officer was negligent in ignoring police procedure did not obviate fact that officer's conduct was intentional; conduct complained of—officer's hitting car window, aiming gun, blocking car in with police cruiser, firing at car's tires and calling a tow truck—was clearly intentional; despite plaintiff's claim that injuries were proximately caused by officer's and department's negligence, plaintiff's allegations fit squarely within section 101.057's exclusion).

- *Harris County v. Cabazos*, 177 S.W.3d 105, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding intentional-tort exception applicable to plaintiff's negligence claim that officer, who had intentionally shot plaintiff during traffic stop, negligently discharged his pistol and negligently effectuated arrest).

- *Morgan v. City of Alvin*, 175 S.W.3d 408, 418-19 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (holding intentional-tort exception applicable to plaintiff's negligence claim arising out of plaintiff's allegation that officer negligently instigated a physical confrontation, handcuffing appellant, dragging him out of laundromat, slamming his head against hood of parked car, and "smashing his person" to the gravel parking lot).

- *City of Garland v. Rivera*, 146 S.W.3d 334, 337 (Tex. App.—Dallas 2004, no pet.) (finding no immunity waiver under intentional-tort exception where plaintiff's father died after use of force during arrest; plaintiff's claim that police negligently used pepper spray, handcuffs, and K-9 unit hinged on intentional, rather than negligent, conduct).

- *City of Laredo v. Nuno*, 94 S.W.3d 786, 788 (Tex. App.—San Antonio 2002, no pet.) (despite plaintiff's efforts to phrase claims in terms of officer's negligent failure to properly place plaintiff in police vehicle and negligent indifference of other officers and city, focus of plaintiff's claims against city was officer's intentional tortious acts of using excessive force to arrest plaintiff and to illegally seize car).

- *Medrano v. City of Pearsall*, 989 S.W.2d 141, 144 (Tex. App.—San Antonio 1999, no pet.) (where focus of claim was on officers' alleged violent and negligent beating of handcuffed driver, intentional-tort exception could not be circumvented merely by alleging negligent hiring, negligent training, and negligent failure to train).

- *City of San Antonio v. Dunn*, 796 S.W.2d 258, 261 (Tex. App.—San Antonio 1990, writ denied) (plaintiff's claim that officer wrongfully arrested him and negligently applied handcuffs so tightly that they caused discomfort and swelling to wrist arose out of intentional tort).

- *Gonzales v. City of Corpus Christi*, 2005 U.S. Dist. LEXIS 28939, (S.D. Tex. Nov. 9, 2005) (despite claim of alleged misuse of handcuffs and leg irons, "all of plaintiff's damages arise out of the claimed instance of excessive force").

• *Holland v. City of Houston*, 41 F .Supp.2d 678, 713 (S.D. Tex. 1999) ("Where the essence of a claim under the TTCA arises from an intentional tort, allegations of negligence are insufficient to avoid the § 101.057 exception to liability.");

• *Huong v. City of Port Arthur*, 961 F. Supp. 1003, 1008-09 (E.D. Tex. 1997) ("Plaintiffs cannot circumvent the intentional tort exception to waiver of municipal liability by simply pleading negligence when the shooting event upon which they base their claims is actually an intentional tort.");

• *Cronen v. Ray & City of Houston*, No. 14-05-00788, No. 14-05-00789-CV, 2006 WL 2547989 (Tex. App.—Houston [14th Dist.] Sept. 5, 2006, no pet.) (mem.op.) (dismissing false arrest/imprisonment claim couched in terms of negligence due to protections of the Texas Tort Claims Act); and

• *City of Houston v. Hernandez*, No. 14-99-00104-CV, 2000 WL 1262465 (Tex. App.—Houston [14th Dist.] Sept. 7, 2000, no pet.) (mem.op.) (dismissing false arrest case couched as negligence because of immunity granted by Texas Tort Claims Act).

Therefore, all state claims, to the extent they are being asserted, are barred by state governmental immunity and the Plaintiff should not be given an opportunity to re-plead inarticulate state claims because doing so would be futile in light of the case law set forth above. Therefore, an order dismissing them is appropriate.

WHEREFORE, PREMISES CONSIDERED Defendants City of Brownfield Police Department, Officer Joshua Coronado, and Officer Matthew Valdonado respectfully pray that the Court grant this motion to dismiss.

Respectfully submitted,

/s/ Matt D. Matzner

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CERTIFICATE OF SERVICE

On September 7, 2012, a true and correct copy of the above and foregoing was served as follows:

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